In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 902

HENRY KLEIN ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–12) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1970. A petition for rehearing was denied on August 28, 1970. Chief Justice Burger, on September 28, 1970, extended the time for filing a petition for a writ of certiorari to and including October 27, 1970. The petition was filed on October 26, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

412-477—70

QUESTIONS PRESENTED

1. Whether telephone and face-to-face conversations between petitioner Klein and an informant and his wife, both of whom consented to electronic monitoring of them, were admissible in evidence against him.

2. Whether the admission of these recorded conversations with Klein, which occurred after termination of the conspiracy, was prejudicial error as to the other three defendants.

3. Whether petitioner Hamilton's conspiracy conviction was invalid on the ground of double jeopardy, because evidence of a burglary, for which he had already been convicted, was introduced to prove his participation in the conspiracy.

4. Whether a search warrant for Klein's business records, used in furtherance of the conspiracy, was too broad in scope.

STATEMENT

Petitioners were tried in the United States District Court for the District of Columbia for conspiracy to commit crimes involving interstate transportation of stolen property (18 U.S.C. 2314), housebreaking (22 D.C. Code 2201), receiving stolen goods (22 D.C. Code 2205), and for substantive offenses involving these crimes. Each petitioner was found guilty of the conspiracy (Count 1) and of one or more substantive counts.[1] Klein, Hamilton and Riggin each

[1] Klein and Tavenner were convicted of housebreaking and larceny in relation to items stolen from a Mrs. Bastedo (Counts 2 and 3). Hamilton and Riggin were convicted of a house-

were given concurrent sentences of from sixteen months to four years; Tavenner was sentenced to concurrent terms of from one to three years. The court of appeals affirmed (Pet. App. 1–12).

The principal government witness was one Barnes, a professional burglar who had been a major figure in the conspiracy. In early 1964, Barnes was taken by one Skeens to the "Greek joint" where he met Tavenner (Tr. 1249, 1350).[2] Skeens also introduced Barnes to Klein, a jeweler, who agreed to become a fence. Klein supplied Barnes with names of places to burglarize for a ten percent cut and first chance to purchase stolen merchandise (Tr. 1250). Barnes testified to committing numerous burglaries after receiving information from Klein, much of which Klein had obtained from his customers (Tr. 1251–1252).

According to Barnes, the information as to the Bastedo house (counts 2 and 3) came from one Fontana whom Barnes called at Klein's direction. Tavenner and Skeens served as look-out men while Barnes and another burglarized the safe (Tr. 1259–1260). Barnes testified that Tavenner also helped him in arranging for robbery of a large, valuable, diamond ring from a hotel on Grand Bahamas Island (Tr. 1278–1282). After the ring was brought to Washington, Tavenner helped guard it and transport it to New York (Tr. 1285–1288).

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breaking and larceny in relation to items taken from one Kotz (Counts 5 and 6). Klein alone was convicted of the interstate transportation of the proceeds of a Vecchione housebreaking (Count 7).

[2] "Tr." refers to the transcript of trial proceedings.

Barnes met petitioners Riggin and Hamilton (Riggin's nephew) in the spring of 1964 (Tr. 1354–1355). They knew of his arrangement with Klein (Tr. 1351, 1355–1356). In August 1964 Barnes, with Hamilton's help, stole a mink coat. Hamilton assisted in the theft of furs from the French Poodle Shop (Tr. 1267), from which he received a large fur (Tr. 1362–1363). The fur subsequently was recovered from Riggin's brother, also an uncle of Hamilton (Tr. 4714, 4717).[3] Hamilton also helped Barnes in the theft of carpets (Tr. 1429–1430). He was ultimately apprehended with Barnes immediately after they had burglarized a Greek church in October (Tr. 4757–4758).

Petitioner Riggin told Barnes about a Mr. "Sharman"—actually Shama—who was a delicatessen owner and bookmaker. Barnes stole a brief case containing $300 from Shama's residence but was caught by him. Barnes asked Riggin to find out if "Sharman" intended to call the police and Riggin did so (Tr. 1561–1566). Shama testified that after he discovered the burglary, he confronted the suspect and obtained his license number (Tr. 5264, 5269). Shama knew Riggin and received a call from him shortly after the burglary but could not recall what was said (Tr. 5267–5268). In January 1965, Riggin told Barnes of jewelry in the apartment of Sarah Kotz. Barnes and Hamilton stole money and three rings which Barnes sold to Klein. Barnes, Riggin and Hamilton divided the money (Tr. 1319–1323).

[3] Hamilton was acquitted of interstate transportation of furs taken in the French Poodle robbery.

ARGUMENT

1. The wife of Skeens, and later Skeens himself, decided to cooperate with the government. They consented to monitoring of telephone conversations and a face-to-face conversation with Klein between November 1965 and February 1966 (Tr. 229–231, 284). The tapes of these conversations were introduced in evidence; the jury was instructed that the testimony was to be considered against Klein alone.

Mrs. Skeens testified that she thought she could help her husband, her friend Barnes, and the Government by cooperating (Tr. 293). Petitioners therefore contend that Skeens and his wife did not consent voluntarily, since they hoped for leniency as the result of their cooperation. The district court properly found, in denying the motion to suppress, that consent "was given voluntarily and without force or coercion by any Government official involved" (Tr. 374–375). The fact that an informer hopes to obtain some consideration for himself by cooperation does not transform his deliberate decision into an involuntary act. *United States* v. *Jones* (C.A.D.C.) decided September 30, 1970, petition for a writ of certiorari pending, No. 920, this Term. See also, brief for the United States in *United States* v. *White,* No. 13 this Term.

The *White* case involves the admissibility of records of face-to-face conversations monitored with the consent of one party. Since that issue also is presented here, the Court may wish to defer action on this petition pending decision in *White*. It should be noted, however, that most of the monitored conversations

involved in this case were by telephone. Whatever the ruling as to face-to-face conversations, we believe that the rationale of *Katz* v. *United States,* 389 U.S. 347, does not extend to a party to a telephone conversation because he assumes the risk that the person to whom he is talking will record the conversation or allow others to hear it. See *Rathbun* v. *United States,* 355 U.S. 107.

2. The monitored conversations between Klein and the Skeens occurred after termination of the conspiracy and were admitted against Klein alone. Petitioners Hamilton and Riggin were, however, mentioned in two conversations. Klein stated that Riggin had asked him to get a lawyer for his nephew, Hamilton, who was in trouble. He also mentioned that he had done a small amount of business with Hamilton. Both Klein and Riggin subsequently took the stand and testified, and during cross-examination, Klein was asked about this conversation.

The court of appeals ruled that the admission of these conversations was error as to Klein's co-defendants on the conspiracy count but found that the error was harmless beyond a reasonable doubt. It also noted that "the issue is not of transcendant importance in this case since the sentences imposed on the conspiracy count all run concurrently with those imposed for substantive offenses" (Pet. App. 7, 8).

This decision by the court of appeals does not warrant further review by this court. Indeed other courts of appeals have held that *Bruton* v. *United States,* 391 U.S. 123, does not apply in a situation where the

person whose declarations naming co-defendants have been introduced subsequently takes the stand and is subject to cross-examination. *United States* v. *Cale*, 418 F. 2d 897 (C.A. 6), certiorari denied, 397 U.S. 1015. *Rios-Ramirez* v. *United States*, 403 F. 2d 1016 (C.A. 9), certiorari denied, 394 U.S. 951; *United States* v. *Boone*, 401 F. 2d 659, 663, n. 12 (C.A. 3), certiorari denied *sub nom. Jackson* v. *United States*, 394 U.S. 933.

The few references to the statements did not have the significance in the trial, which spanned several months, that petitioners seek to attach to them. Tavenner was not mentioned in the statement. And there was other evidence with respect to Hamilton and Riggin, corroborating Barnes' testimony about their participation in the conspiracy. Hamilton's association with Barnes was established by the fact that they were arrested together after the burglary of the Greek church. The testimony of Mrs. Kotz and Mr. Shama corroborated Barnes' testimony that Riggin was the source of the information which led to burglaries of their homes.

3. The fact that Hamilton already had been convicted of the burglary of the Greek church does not preclude his conviction of conspiracy on grounds of double jeopardy, *Pereira* v. *United States*, 347 U.S. 1, or otherwise. The evidence with respect to the burglary was clearly relevant as part of the proof of the conspiracy, and therefore properly admissible.

4. Prior to indictment, on March 19, 1966, a search warrant was obtained, upon the affidavit of police offi-

cers, to search Klein's jewelry store at 1009 E Street, N.W., for "any books, records, receipts, sales slips, receipt slips, repair slips, appraisal data, customer lists and related papers, documents, writings, printings, notations and related paraphernalia maintained in furtherance of the conspiracy described in the attached affidavit and any fruits of such housebreakings, larcenies and interstate transportation of stolen property as set forth in said affidavit." The affidavit stated that Barnes had advised that records were maintained by Klein which "* * * recorded the names, addresses, phone numbers of the customers and descriptive information pertaining to certain jewelry purchased, repaired, cleaned, appraised and examined * * *" and that such records were "regularly resorted to by Henry Klein in the planning of the crimes intended in the above-mentioned conspiracy." In executing the search warrant, the police seized Klein's business records, letters of appraisal, wholesale receipts, duplicate bills of sale, other bills, diplomatic lists and address books. The records, some of which contained the names of various burglary-conspiracy victims and proposed victims (*e.g.*, Tr. 922, 924–925, 936–937), were originally placed in boxes in no order, but were later arranged in monthly chronology (Tr. 651–653, 656).

There is no challenge to the sufficiency of the affidavit supporting the warrant. Petitioners contend only that the search warrant for all books, records and "related paraphernalia maintained in the furtherance of the conspiracy" was overly broad (Pet. 14–

15). In view of the showing in the affidavit as to the role of the records kept in the jewelry store in the conspiracy, this contention was properly rejected. The situation here is distinguishable from that in *Stanford v. Texas,* 379 U.S. 476, 486, where the search warrant embraced all documents "concerning the Communist Party of Texas, and the operations of the Communist Party in Texas." The material here, while in the form of records rather than "weapons, narcotics or 'cases of whiskey,'" *ibid.,* is certainly not entitled to the same degree of protection as materials which are directly protected by the First Amendment, as the material was in *Stanford. Id. at* 485.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied, although the Court may wish to defer decision until after its ruling in *United States* v. *White,* No. 13, this Term.

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DECEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970